Filed

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 1055 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of respondent's order to backfill a well, came on for hearing before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, and Chris Smith, member, on February 27 and 28, 1978 in Lacey, Washington. Hearing examiner William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230. Olympia court reporter Deborah Young recorded the proceedings.

Appellant appeared by and through its counsel, David A. Bateman, Assistant Attorney General. Respondent appeared by and through its counsel, Laura E. Eckert, Assistant Attorney General. Having heard

the testirony, having examined the exhibits, having considered the briefs and arguments, and being fully advised, the Hearings Board makes and enters the following

FINDINGS OF FACT

I

In January, 1973, the Department of Ecology (DOE) established the boundaries of a geographic region, lying primarily in Grant County, known as the "Quincy ground water subarea". Chapter 173-124 WAC. In January, 1975, acting pursuant to RCW 90.44.130, the United States Bureau of Reclamation filed a declaration of ownership of artificially stored ground water within the Quincy subarea. This declaration was accepted by DOE and the Bureau also agreed to make a large quantity of the artificially stored ground water available for appropriation. A cooperative management system was devised by which DOE promulgated regulations governing withdrawal of the artificially stored ground water. Chapters 173-134 and 136 WAC. Artificially stored ground water is owned by the holder and thus is legally distinct from public ground water owned by the state. RCW 90.44.035-.040 and -.130.[1]

These regulations, consistent with the federal declaration of ownership, establish a "shallow management unit" and a "deep management unit". WAC 173-134-030. Artificially stored ground water owned by the Bureau is entirely contained within the shallow unit where it commingles with public ground water. WAC 173-134-060. Public ground water, only, is

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1. Both the establishment of a subarea by DOE and the process by which a person may declare ownership of ground water artificially st therein are described in RCW 90.44.130.

contained within the deep unit. WAC 173-134-050. The shallow unit is defined, at WAC 173-134-020(10), as:

> . . .
> "Shallow Management Unit" shall mean the ground water hydraulically continuous between land surface and a depth of 200 feet into the Quincy basalt zone and includes all of the Quincy unconsolidated zone, and shall be used in these regulations for the purpose of water management.

The deep unit is defined, at WAC 173-134-020(4), as:

> . . .
> "Deep Management Unit" means all ground waters underlying the shallow management unit.
> . . .

II

In March, 1975, Department of Natural Resources (DNR) received from DOE a permit to use artificially stored ground water (No. G3-21317P; QB No. 154). That permit, consistent with the above regulation establishing the shallow (artificial ground water) unit, allowed:

> "five (5) wells TO BE NOT DEEPER THAN 200 FEET INTO THE BASALT" (Exhibit A-1).

No appeal of this condition nor any other part of the permit was taken by DNR to this Hearings Board.

III

In October, 1975, construction began on the first of the five wells permitted, known as East Cole Well No. 1. Actual measurement taken after the well was drilled established its depth as 510 feet below land surface, although the depth reported by the well driller was 519 feet.

Well logs, which record each stratum of material penetrated as

a well is drilled, were made for the subject well and, also, for the four other wells referred to in the same permit. All five of the wells are contained within one section of land (Sec. 36, T. 19 N., R. 26 EWM). These logs establish that unconsolidated or semiconsolidated sediment (sand, mud, clay) overlies basalt, yet the physical border between sediments and basalt is not abrupt. Rather the top of the basalt is broken and filled or seamed with sediments. Further down, these fills and seams, diminish giving way to "solid" basalt.

IV

In July, 1976, DOE issued the following order (Exhibit A-4) to DNR:

> "IT IS ORDERED THAT permit number G3-21317P be canceled effective 60 days following receipt of this Notice and Order unless the permit holder shows good cause as to why the permit should not be canceled. Good cause is defined as backfilling of the well with an impermeable material (cement grout or concrete) between the depths of 486 and 519 feet."

From this order, DNR appeals.

V

It was the intent of DOE that "200 feet into the Quincy basalt zone" as prescribed by WAC 173-134-020(10)[2] should be measured from the "upper surface of basalt" as shown on a map published as part of "Water Supply Bulletin No. 8", Vol. I State of Washington (Exhibit A-15). That map, or a reference to it, was left out of the actual regulation by inadvertence. From well logs contained

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2. Text of WAC 173-134-020(10) appears in Finding of Fact I.

within "Bulletin No. 8", we find that the "upper surface of basalt" was intended to mean the first encounter with basalt, whether seamed with sediments or not. To illustrate this point, the following well logs, for wells near the subject property, are cited together with the nature of the material at that depth marked on the map (by contour lines) as the "upper surface of basalt". Page numbers refer to "Bulletin No. 8":

PAGE	WELL	MATERIAL
449	19/26-1R1	"Basalt, soft, deeply weathered, broken, brown".
488	20/26-22P1	"Basalt" underlain by "basalt, porous, honeycomb, water".
452	19/27-1J1	"Basalt, broken" underlain by "clay, red"
453	19/27-12A1	"Basalt, broken, black".
483	20/25-8M1	"Basalt, honeycomb" underlain by "clay or talc, black".

VI

The distance from land surface down to the first encounter with basalt is as follows for the five wells contained in DNR's permit, according to well logs in evidence:

East Cole No. 1	280'
East Cole No. 2	304'
East Cole No. 3	300'
East Cole No. 4	300'
East Cole No. 5	307'

VII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings come the following

CONCLUSIONS OF LAW

I

Appellant, DNR, urges that the designation of "200 feet into the Quincy basalt zone" in WAC 173-134-020(10)[3] is arbitrary and capricious because it bears no relation to management of ground waters in light of WAC 173-134-060(3) insuring adequate water for projects of the Bureau of Reclamation. Respondent DOE has countered this contention with a "Motion in Limine" to exclude any evidence on that point. Respondent's Motion is granted. We conclude that once DNR accepted its ground water permit and elected not to appeal within the 30-day period prescribed in RCW 43.21B.120, it became barred from contending, in later actions such as this one, that the permit or underlying regulation is arbitrary and capricious. This accords with the rule that the order or determination of an administrative body, such as DOE, acting with jurisdiction and under authority of law is not subject to collateral attack. Rupert v. Social & Health Servs., 89 Wn.2d 698 (1978); Pankow v. Holman Properties, Inc., 13 Wn. App. 537, 541, 536 P.2d 28 (1975); Knestis v. Unemployment Compensation and Placement Div., 16 Wn.2d 577, 581, 134 P.2d 76 (1943).

We distinguish, however, DNR's further contention that the subject well, East Cole No. 1, is not more than 200 feet into the basalt. That contention arises from a dispute over what constitutes "basalt", a dispute that did not come into being until actual drilling was conducted by DNR and issuance of the DOE order (Exhibit A-4) now on appeal. This was considerably after the 30-day period for appeal of the permit, and

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3. Text of WAC 173-134-020(10) appears in Finding of Fact I.

thus DNR is entitled to a resolution of that dispute in this appeal.

II

In this appeal, therefore, we must resolve the meaning of "basalt" in the permit condition "not deeper than 200 feet into the basalt" and in the underlying regulation WAC 173-134-020(10). Appellant, DNR, urges that basalt must mean the first occurrence of basalt which is not seamed or filled by sediments. Respondent, DOE, urges that basalt must mean that first encounter with basalt, whether seamed with sediments or not. We conclude that DOE is correct.

The permit issued to DNR is an administrative order. As such it should be construed by looking first at its terms, and then, only if it is ambiguous on its face, by looking to the intention of the issuing administrative agency. ITT Rayonier v. DOE, PCHB Nos. 970 and 1025 (1976) and cases cited therein. Both the permit itself ("200 feet into the basalt") and WAC 173-134-020(10) defining "shallow management unit" ("200 feet into the Quincy basalt zone") contain the word "basalt" without limitation, exemption or exclusion of seamed or filled basalt. We therefore find no ambiguity and conclude that the terms of the permit direct that 200 feet be measured from the

first encounter with basalt whether seamed with sediments or not.[4]

Assuming, arguendo, that the word "basalt" in this permit and in WAC 173-134-020(10) is ambiguous; we nevertheless arrive at the same conclusion after examining the intent of DOE as the issuing administrative agency. We have found that DOE intended 200 feet be measured from the "upper surface of basalt" as prescribed by a map which forms part of "Water Supply Bulletin No. 8". While that map was not included in a regulation, nor officially updated, and while it is not as dependable as a well log in locating basalt at a specific location, it does establish that DOE did not intend to eliminate, exempt, or exclude basalt which is broken or seamed with sediments. (See Finding of Fact IV)

III

The well log for the subject well, East Cole No. 1, places the first encounter with basalt at 280 feet below surface. This is in marked contrast with the four other wells in the same section whose logs place basalt at or near 300 feet below surface. (See Finding of

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4. Appellant, DNR, offered testimony that DOE allowed drilling deeper than 200 feet below the first encounter with basalt at the so called "Treiber Well" (Section 26, T. 22N., R. 26 EWM) located 18 miles north of East Cole No. 1 which is the subject of this appeal. This was on the assumption that the first basalt encountered was a "float block". The Treiber well is located in an area north of Ephrata where, in ancient times, boulders of basalt eroded off basalt cliffs then exposed at the surface. These boulders were moved by ancient flooding, and became known as "float blocks". The floods that carried them, however, are known to have lost momentum in their southward movement around the present site of Ephrata. While DOE may or may not have intended to exclude float blocks from the meaning of "200 feet into the Quincy basalt zone" (WAC 173-134-020(10)), there is no evidence that a float block exists at the location of East Cole Well No. 1 which is the subject of this appeal. The DOE action in regard to the Treiber well therefore affords no basis for relief to DNR in this appeal.

Fact V). We conclude that such deviation, within one square mile of surface, indicates that an error was made in the log of the subject well, and that the first encounter with basalt in East Cole No. 1 is at or about 300 feet below surface.

IV

Respondent cites RCW 90.03.320 (made applicable to ground water by RCW 90.44.020) in support of its order now on appeal:

> ". . . If the terms of the permit or extention thereof, are not complied with the supervisor shall give notice by registered mail that such permit will be canceled unless the holders thereof shall show cause within sixty days why the same should not be so canceled. If cause be not shown, said permit shall be canceled."

In a permit cancellation hearing such as this one, DOE bears the burden of proving that the "terms of the permit" have been violated. The permittee (DNR), however, carries the burden of proving a "cause" why the permit should not be cancelled in the event that DOE has proven a violation.[5] This rule is consistent with the statutory scheme for cancellation hearings (RCW 90.03.320, supra) and with our prior holdings in Chvatal v. DOE, PCHB No. 471 (1974) and Pack v. DOE, PCHB No. 213 (1974). The cases cited by DNR relating to burden of proof in penalty cases are not pertinent to a permit cancellation case such as this one.

Here, DOE has affirmatively proven that DNR violated a term of its permit by drilling deeper than 200 feet into the basalt which occurs at 300 feet below surface in East Cole Well No. 1. Nevertheless, DNR has

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5. Clearly, "cause" refers to a reason or rationale brought forth in argument, and does not mean the act of "backfilling" as stated in the DOE order. (See Finding of Fact IV.)

shown cause sufficient to thwart an immediate cancellation of its permit by demonstrating that its well is only 10-19 feet[6] below the maximum depth of 500 feet (300 to basalt + 200). While the legal significance of this misstep is to "cross the border" from the artificially stored ground water to the lower public ground water which the permit does not pertain to, the practical solution is immediately at hand. This matter should be remanded to DOE for the purpose of setting a reasonable time within which DNR must backfill its well from its present depth to the 500 foot depth imposed by the permit; or, carry out other means prescribed by DOE to assure that public ground water will not be withdrawn from the deep management unit which extends from 500 feet downward at the location of the subject well. In as much as there is a dispute as to the actual depth of the well, both parties should engage in the remeasurement of depth prior to the time remedial action is taken. If DNR fails to accomplish the backfilling or other remedial action within the reasonable time prescribed then, in that event, the permit for East Cole Well No. 1 must be cancelled by operation of the order now on appeal. Upon remand, the parties should pursue their respective responsibilities in a spirit of practical problem solving between two agencies of the same state government.

V

We have examined the appellant's other contentions and find them to be without merit.

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6. See Finding of Fact III regarding the discrepancy in the depth of the subject well.

VI

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board comes to this

ORDER

The DOE Order (DE 76-261) is affirmed; provided however, that this matter is remanded to DOE for the purpose of setting a reasonable time within which East Cole Well No. 1 shall be backfilled to a depth of 500 feet below land surface or within which DNR shall take other remedial action prescribed by DOE to assure that public ground water will not be withdrawn from the deep management unit. Both parties shall engage in cooperative remeasurement of the well prior to the time remedial action is taken. Upon failure to backfill within the reasonable time so set, the permit for East Cole Well No. 1 shall then be cancelled by operation of the DOE Order (DE 76-261).

DATED this 30TH day of March, 1978.

POLLUTION CONTROL HEARINGS BOARD

DAVE J. MOONEY, Chairman

CHRIS SMITH, Member